(25) (18) (19)
REC'D TEAM 11
No. 00-1751, 00-1777 & 00-1779
Supreme Court, U.S.
FILED
NOV 9 2001
OFFICE OF THE CLERK
NOV 20 2001
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IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, *et al.*,

Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has consistently supported the principle of fair and even-handed treatment for children who attend Jewish and other religious schools. Over the past 33 years, from *Board of Education v. Allen*, 392 U.S. 236 (1968), to *Mitchell v. Helms*, 530 U.S. 793 (2000), COLPA has filed *amicus* briefs in nearly all of this Court's educational funding cases involving the Religion Clauses of the First Amendment.

COLPA submits this *amicus* brief on behalf of, and is joined by, the following national Orthodox Jewish organizations:

- Agudas Harabonim of the United States and Canada – The oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

- Agudath Israel of America – The nation's largest grassroots Orthodox Jewish organization, with chapters in numerous Jewish communities throughout the United States and Canada. One of Agudath

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[1] No party or party's counsel authored this brief in whole or in part and no person or entity other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief. See Rule 37.6

Israel's functions is to serve as an advocate for the cause of Jewish schools and Jewish education.

- National Council of Young Israel – A coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel that is involved in matters of social and legal significance to the Orthodox Jewish community.

- The Rabbinical Alliance of America – An Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

- The Rabbinical Council of America – The largest Orthodox Jewish rabbinical organization in the world with a membership that exceeds one thousand rabbis and is deeply involved in issues related to religious freedom.

- Torah Umesorah-National Society for Hebrew Day Schools – The coordinating body for more than 600 Jewish Day Schools across the United States and Canada.

- The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A.") – The largest Orthodox Jewish synagogue organization in North America, representing nearly one thousand member congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

Individual Orthodox Jews who are members of these organizations subscribe to the view that Jewish

education is a key, if not *the* key, to Jewish continuity and survival. The overwhelming majority of these organizations' constituents, as well as an increasing number of Jewish parents who are not affiliated with these organizations, choose to send their children to Jewish elementary and secondary schools. They do so because Jewish religious school education is the most reliable means of teaching the values of the Jewish faith to Jewish children. It is virtually a religious necessity to provide a thorough Jewish education to a Jewish child in the United States, and it is consistent with the fundamental constitutional principle recognized by this Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Jewish day schools are now located in 38 States, and their total student population exceeds 180,000. Schick, *A Census of Jewish Day Schools in the United States*, p. 3 (Avi Chai Foundation 2000). In New York State, home to the largest concentration of Jewish families in the United States, State Education Department figures for school year 1980-81 showed 56,000 students. Ten years later, for school year 1990-91, the number of students had increased to more than 82,000.[2] The latest Jewish day school enrollment figure for New York State is in excess of 100,000. See Schick, *supra*, p. 20. Similar growth patterns – albeit not as dramatic – have occurred in other parts of the country.

But with growth come growing pains. Many Jewish schools, especially those that service children from low-income backgrounds, struggle mightily to meet skyrocketing budgets. Outstanding teachers leave their

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[2] *New York State Education Department, Nonpublic School Enrollment And Staff: New York State* (University of the State of N.Y., 1998)

jobs because they are paid too little, too late or not at all. Jewish parents struggle mightily and sacrifice heroically to send their children to Jewish day schools so that they will learn not only reading, writing and arithmetic, but also about the Jewish people's history, culture and faith. And many Jewish parents are financially unable to pay even the minimum necessary to gain entrance to a Jewish day school. While it is heartening that the American Jewish community has committed a greater percentage of its charitable resources to Jewish education, many Jewish schools and parents continue to face serious fiscal problems.

This is why COLPA and the organizations it represents have had a long-standing interest in promoting and defending constitutionally permissible means of expanding the range of parental choice. Programs such as the Ohio school-voucher system enable parents with even the most modest means to select alternatives to designated public schools. On behalf of the Orthodox Jewish community, COLPA filed an *amicus curiae* brief in *Mitchell v. Helms*, 530 U.S. 793 (2000), addressing the harmful consequences of the restraints that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and subsequent restrictive rulings of this Court had imposed upon *neutral* government financial support for secular education in *all* schools – be they public or private, secular or religious. This Court's decision in *Mitchell v. Helms* was a welcome reappraisal of the doctrinaire rules of constitutional law that had seriously impeded the proper education of hundreds of thousands of children in the United States.

This case affords the Court another opportunity to remove constitutional clouds from innovative programs that improve educational opportunities for American

parents and children. School-voucher programs such as the Ohio provisions challenged in this case begin to give parents a real choice in selecting the best schools for their children. By enabling parents to direct state education funds to any qualified school that, in the view of the parents, offers the best education for their children, school-voucher laws open new avenues for educational improvement of *all* schools throughout the nation. For the first time in the history of American education, the public-school system is being challenged by competitive forces to improve the quality of its services.

Although no Jewish school has heretofore participated in the Ohio program that is challenged in this case,[3] the constitutional principle that this case will establish has great significance for parents across the country who want to educate their children in Jewish schools. The Court's recent precedents provide ample support for the overriding constitutional proposition that we believe governs this case – *i.e.*, that any legislation that uniformly affords everyone an opportunity for true private choice in selecting a child's education is presumptively constitutional so long as it is not exploited to defy compelling federal policies such as racial desegregation. That presumption is not to be set aside because a parent may chose a private school rather than a public school or because the parent selects a religious or "sectarian" school rather than one that is secular in outlook. The Establishment Clause of the First

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[3] The Cleveland Area Director of the American Jewish Committee reported, "Because the Cleveland Voucher Plan was limited to the City of Cleveland, and because there are very few Jews living within the city limits, there has been no direct impact of the plan on the Jewish community." Martin J. Plax, *"The Cleveland Experiment," in* Breger & Gordis, Vouchers for School Choice: Challenge or Opportunity? p. 33 (Wilstein Institute of Jewish Policy Studies 1998).

Amendment should not be manipulatively exploited as a barrier to prevent American parents from effectively choosing the schools that will best serve their children.

ARGUMENT

I

THIS COURT'S DECISIONS PRIOR TO *MITCHELL v. HELMS* RECOGNIZED THE CONSTITUTIONAL LEGITIMACY OF INDIVIDUAL PRIVATE CHOICE

Mueller v. Allen, 463 U.S. 388 (1983), concerned a Minnesota law that authorized state income–tax deductions for parent's educational expenses, including those for children attending parochial schools. In a majority opinion by then Associate Justice Rehnquist, the Court upheld the constitutionality of the law against an Establishment Clause challenge. The Court recognized "that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children." 463 U.S. at 399. Nonetheless, the Court added, in an observation applicable to this case (*id.*; citation omitted):

> It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous private choices of individual parents of school-age children . . . . Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of state approval" can be deemed to have been conferred on

> any particular religion, or on religion generally.

The Court's opinion in *Mueller v. Allen* went on to emphasize that the financial benefits to religious schools in that case were "ultimately controlled by the private choices of individual parents" (463 U.S. at 400), and that the decisions of parents of children in private schools to take advantage of such tax relief "is no doubt due to the fact that they bear a particularly great financial burden in educating their children" (463 U.S. at 402).

The "private-choice" rationale of *Mueller v. Allen* was applied in two seminal governmental aid-to-education cases decided in subsequent Terms. In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), *all* the Justices agreed that the "private choice" exercised by a recipient of a state grant for the training of the handicapped to use the funds for religious training as a minister insulated the grant from an Establishment Clause challenge. Justice Marshall – who was a staunch proponent of a broad application of the Establishment Clause – said in his majority opinion (474 U.S. at 488):

> Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.

And Justice Powell, who joined Justice Marshall's opinion, issued a concurrence that reaffirmed *Mueller v. Allen* and went on to note (474 U.S. at 490-491; emphasis added and footnote omitted):

> [S]tate programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate the second part of the *Lemon v. Kurtzman* test, *because any aid to religion results from the private choices of individual beneficiaries.*

In her separate concurrence, Justice O'Connor quoted this passage from Justice Powell's concurrence and added (474 U.S. at 493):

> The aid to religion at issue here is the result of petitioner's private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief.

The constitutional legitimacy of private choice was reaffirmed in *Zobrest v. Catalina Foothills School District*, 509 U.S. 7 (1993). A government-paid sign-language interpreter was permitted to serve a deaf student at a Roman Catholic high school because the interpreter's presence at the religious school was "a result of the private decision of individual parents." 509 U.S. at 10. Even the dissenting Justices in *Zobrest* agreed that "[w]hen government dispenses public funds to individuals who employ them to finance private choices, it is difficult to argue that government is actually endorsing religion." 509 U.S. at 22-23. The dissenters would have decided *Zobrest* differently only because of "the graphic symbol" of having a government-paid interpreter "mouthing" a religious message. 509 U.S. at 23. If not for that apparent state imprimatur on religion, the interposition of private choice between the State's

financial grant and the use of the State's funds in a religious school would, even in the view of the dissenters, have overridden the Establishment Clause challenge.

II

THE PLURALITY OPINION AND THE OPINION OF JUSTICES O'CONNOR AND BREYER IN *MITCHELL v. HELMS* CONFIRMED THE PRIVATE-CHOICE RATIONALE

Mitchell v. Helms, 530 U.S. 793 (2000), concerned a program of state aid to education under which state-funded materials and equipment were provided to public and private schools, including those that were "pervasively sectarian." Although private choice was not directly relevant to the precise issue before the Court, six Justices explicitly approved the private-choice rationale that governs this case.

In *Agostini v. Felton*, 521 U.S. 203, 226 (1997), the Court's majority opinion had quoted the language of *Witters* that had insulated from Establishment Clause challenge money that went to religious institutions "only as a result of the genuinely independent and private choices" of individuals. The plurality opinion in *Mitchell v. Helms* again quoted that language (530 U.S. at 809). The *Mitchell* plurality went on to say, in terms that foreshadow the issue in this case (530 U.S. at 809-810; citations omitted):

> We have viewed as significant whether the "private choices of individual parents," as opposed to the "unmediated" will of government, determine what schools ultimately benefit from the government aid,

> and how much. For if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program, and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones.

Justice O'Connor's concurring opinion in *Mitchell v. Helms* (joined by Justice Breyer) emphasized the difference between a "per-capita-aid program" and a system of government financial aid for education that is a "true private-choice program." (530 U.S. at 842). Justice O'Connor observed that when the decision to direct the government funds to a particular school is made by the parent, "[t]he fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision." (530 U.S. at 842) (emphasis original). That distinction, she noted, quoting her conclusion in *Witters*, makes a significant difference, as well, in any appearance of endorsement (*id.*):

> [W]hen government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, "[n]o reasonable observer is likely to draw from the facts . . . an inference that the

> State itself is endorsing a religious practice or belief."

In sum, this Court's line of cases from *Mueller v. Allen* through *Witters*, *Zobrest*, *Agostini*, and, most recently, *Mitchell v. Helms*, has reaffirmed time and again that a "true private choice" to assign government funds, *inter alia*, to a private religious school overcomes any Establishment Clause claim. That simple principle governs and controls this case and the constitutionality of any neutral school-voucher program.

III

MAXIMIZING PRIVATE CHOICE IS A SOCIALLY DESIRABLE OBJECTIVE THAT PROMOTES FUNDAMENTAL CONSTITUTIONAL RIGHTS

Our free society encourages individuals to make personal choices on the broadest range of subjects. We encourage competition in consumer goods, and we expect Americans to make their own distinctive decisions as to how to spend their money. In fact, government encourages choice over a wide array of government-sponsored conduct. One perceptive scholar recently noted the anomaly of singling out education as the unique subject on which personal private choice – particularly when religiously motivated – is denied:

> We can live where we choose, even if we are on welfare. We can eat what we like, even if we are on food stamps. We can go to the doctor that we favor, even if we are on Medicaid. We can attend the college of our choice, even if we pay for it with Pell Grants

> or other scholarships. We can travel where we like, even if we get there by public transportation. In the midst of all that, elementary and secondary education is a sort of policy ghetto. It is just about the only place where we take for granted that involuntary, government-run, no-choice state monopoly, state regulation and control should rule our lives, and this in respect to something so very crucial to our lives.

Chester E. Finn, Jr., *"The Effect Upon Public Schools: Financing and Support," in* Breger & Gordis, Vouchers for School Choice: Challenge or Opportunity? p. 55 (Wilstein Institute of Jewish Policy Studies 1998).

Singling out education – and particularly religious education – as the one aspect of modern life in which a personal determination regarding available public funds or facilities may *not* be made deprecates both education and religion. The Ohio tuition voucher plan challenged in this case gives parents the power to make practical personal choices by selecting the school to receive government funds set aside for their children's education. That is a desirable empowerment of individual citizens.

The possibility that religion may influence this private choice does not invalidate it, any more than it would invalidate a housing subsidy used by its recipient to pay rent on an apartment selected because it is near a church. This Court's recent decisions have recognized that in contemporary society religion is a legitimate motivation for private behavior, and that the Establishment Clause does not relegate religion to disfavored status. A parent who chooses to use

governmental funds to pay a child's tuition at a religious school is engaging in behavior that is as worthy as the choice of the parent who selects a school because of its better athletics or drama program, or because the school excels in math or laboratory sciences. Indeed, the parent's choice of a religious school has long been recognized to be constitutionally protected. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

Whenever true private choice is interposed between a government expenditure and the recipient of the government funds, government is not "endorsing" or sponsoring the institution that is given the government payment. The benefit is conferred, in such an instance, by the private citizen who makes his or her personal choice.

Nor is it only the parents and children directly affected who gain from a law permitting private choice. Competition from the private sector may spur greater achievement in the public schools and thereby benefit the children who remain in the public-school system. Similar "yardstick regulation" programs have routinely been implemented in other areas of public life such as transportation, public-utility services, and services to low-income persons.

IV

THE *NYQUIST* DECISION SHOULD BE OVERRULED

The majority of the court below invalidated Ohio's school-voucher program because it believed that "*Nyquist* governs our result." Pet. App. 24a. Although

we disagree with the specific grounds that the majority below cited as supporting the applicability of *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 745 (1973) ("*Nyquist*"), -- *i.e.*, the majority's erroneous assertions that the Ohio program, although neutral on its face, favored "sectarian" schools and that it effectively excluded public schools -- the lower court's reliance on *Nyquist* proves that the continued presence of that 1973 decision may result in the judicial invalidation of similar programs in other jurisdictions. The time has come to give *Nyquist* the same authoritative burial that this Court gave to *Aguilar v. Felton*, 473 U.S. 402 (1985), in its decision in *Agostini v. Felton*, 521 U.S. 203, 235-236 (1997), and that it gave to *Meek v. Pittenger*, 421 U.S. 349 (1975), and to *Wolman v. Walter*, 433 U.S. 229 (1977), in its recent decision in *Mitchell v. Helms*, 530 U.S. at 793, 835 (2000). *Nyquist*, like these other decisions, rests on now-rejected premises of hostility to religion and religious education. The clear trend of this Court's precedents over the last two decades has been toward principled neutrality and away from the strict separationism of the 1970's. Recent decisions, including last Term's ruling in *Good News Club v. Milford Central School*, 121 S. Ct. 2093 (2001), have granted to religious institutions the equality before the law that had long been denied under the guise of enforcement of the Establishment Clause.

This Court should take another important step in providing fair and equitable treatment to parents who choose to have their children educated in religious nonpublic schools. It should declare, in this case, that States may enact tuition-voucher programs under which a parent's private choice to educate a child in a religious school is as legitimate as the child's compulsory assignment to a public school, and that it may result in

assistance, from the public treasury, to the substantial cost of private education. If the State's program, like Ohio's, is truly neutral—and does not create any "impermissible incentive" to choose a religious school and if it is not a subterfuge to avoid racial desegregation, it does not, under this Court's recent decisions, raise any question under the Establishment Clause or any other constitutional provision. This Court should unequivocally declare that constitutional principle and authoritatively overrule the only precedent that might be thought to warrant a different result.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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